

1 **CLARIFICATIONS TO GUARDIAN AD LITEM**

2 2006 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Dan R. Eastman**

5 House Sponsor: Steven R. Mascaro

7 **LONG TITLE**

8 **General Description:**

9 This bill makes changes to the Guardian Ad Litem statute in response to a legislative
10 audit.

11 **Highlighted Provisions:**

12 This bill:

- 13 ▶ clarifies some duties of the Guardian Ad Litem;
- 14 ▶ separates out some responsibilities from others to make the division clear;
- 15 ▶ removes some unnecessary cross-references;
- 16 ▶ clarifies the release of records to the Legislature; and
- 17 ▶ makes technical corrections.

18 **Monies Appropriated in this Bill:**

19 None

20 **Other Special Clauses:**

21 None

22 **Utah Code Sections Affected:**

23 AMENDS:

24 **78-3a-912**, as last amended by Chapters 102, 286 and 304, Laws of Utah 2005

25 **78-7-9**, as last amended by Chapter 168, Laws of Utah 2002

27 *Be it enacted by the Legislature of the state of Utah:*



28 Section 1. Section **78-3a-912** is amended to read:

29 **78-3a-912. Appointment of attorney guardian ad litem -- Right of refusal --**
30 **Duties and responsibilities -- Training -- Trained staff and court-appointed special**
31 **advocate volunteers -- Costs -- Immunity -- Annual report.**

32 (1) ~~[(a)]~~ The court~~[-(i)]~~ may appoint an attorney guardian ad litem to represent the best
33 interest of a ~~[minor]~~ child involved in any case before the court~~[:]~~ and ~~[(ii)]~~ shall consider only
34 the best interest of a ~~[minor, consistent with the provisions of Section 62A-4a-201,]~~ child in
35 determining whether to appoint a guardian ad litem.

36 ~~[(b) In all cases where an attorney guardian ad litem is appointed, the court shall make~~
37 ~~a finding that establishes the necessity of the appointment.]~~

38 (2) An attorney guardian ad litem shall be appointed to represent the best interest of
39 each ~~[minor]~~ child who may become the subject of a petition alleging abuse, neglect, or
40 dependency, from the ~~[earlier of]~~ date the ~~[day that: (a) the minor]~~ child is removed from the
41 ~~[minor's]~~ child's home by the division~~[:]~~, or ~~[(b)]~~ the date the petition is filed, whichever occurs
42 earlier.

43 (3) The Office of the Guardian Ad Litem Director, through an attorney guardian ad
44 litem, shall:

45 (a) represent the best interest of the ~~[minor]~~ child in all proceedings;

46 (b) ~~[prior to representing any minor before the court,]~~ be trained in~~[-(i)]~~ applicable
47 statutory, regulatory, ~~[and]~~ case law~~[: and]~~, and the curriculum established by the Office of the
48 Guardian Ad Litem for representation of children prior to representing any child before the
49 court;

50 ~~[(ii) accordance with the United States Department of Justice National Court~~
51 ~~Appointed Special Advocate Association guidelines;]~~

52 (c) conduct or supervise an independent investigation in order to obtain first hand, a
53 clear understanding of the situation and needs of the ~~[minor]~~ child;

54 (d) (i) personally meet with the ~~[minor]~~ child;

55 (ii) personally, or through a trained staff, interview the ~~[minor]~~ child if the ~~[minor]~~
56 child is old enough to communicate; and

57 (iii) determine the ~~[minor's]~~ child's goals and concerns regarding placement~~[: and]~~
58 when the child is capable of expressing goals and desires, and when the guardian ad litem

59 determines it would not be harmful to the child to ask questions concerning the child's desires
60 regarding placement;

61 ~~[(iv) personally assess or supervise an assessment of the appropriateness and safety of~~
62 ~~the minor's environment in each placement;]~~

63 (e) file written motions, responses, or objections at all stages of a proceeding when
64 necessary to protect the best interest of a [minor] child;

65 (f) personally or through a trained volunteer, paralegal, or other trained staff, attend all
66 administrative and foster care citizen review board hearings pertaining to the [minor's] child's
67 case;

68 (g) participate in all appeals unless excused by order of the court;

69 (h) be familiar with local experts who can provide consultation and testimony
70 regarding the reasonableness and appropriateness of efforts made by the Division of Child and
71 Family Services to~~[-(i)]~~ maintain a [minor] child in the [minor's] child's home~~[-(i)]~~; or ~~[(ii)]~~ to
72 reunify a [minor] child with the [minor's] child's parent;

73 (i) to the extent possible, and unless it would be detrimental to the [minor] child,
74 personally or through a trained volunteer, paralegal, or other trained staff, keep the [minor]
75 child advised of~~[-(i)]~~ the status of the [minor's] child's case;

76 ~~[(ii) all court and administrative proceedings;]~~

77 ~~[(iii) discussions with and proposals made by other parties;]~~

78 ~~[(iv) court action; and]~~

79 ~~[(v) the psychiatric, medical, or other treatment or diagnostic services that are to be~~
80 ~~provided to the minor;]~~

81 (j) review proposed orders for, and as requested by the court~~[-(k)]~~, prepare proposed
82 orders with clear and specific directions regarding services, treatment, and evaluation,
83 assessment, and protection of the [minor] child and the [minor's] child's family; and

84 ~~[(h)]~~ (k) personally or through a trained volunteer, paralegal, or other trained staff,
85 monitor implementation of a ~~[minor's child and family]~~ child's treatment plan and any
86 dispositional orders to~~[-(i)]~~ determine whether services ordered by the court~~[-(A)]~~ are actually
87 provided~~[-(B)]~~, are provided in a timely manner~~[-(ii)]~~, and attempt to assess whether
88 ~~[services ordered by the court]~~ they are accomplishing ~~[the]~~ their intended goal ~~[of the~~
89 ~~services]~~.

90 (4) (a) [~~Consistent with this Subsection (4), an~~] An attorney guardian ad litem may use
 91 trained volunteers, in accordance with Title 67, Chapter 20, Volunteer Government Workers
 92 Act, trained paralegals, and other trained staff to assist in investigation and preparation of
 93 information regarding the cases of individual [~~minors~~] children before the court. [~~(b) The~~] An
 94 attorney guardian ad litem [~~described in Subsection (4)(a)~~] may not, however, delegate the
 95 attorney's responsibilities described in Subsection (3).

96 [~~(c)~~] (b) All volunteers, paralegals, and staff utilized pursuant to this section shall be
 97 trained in and follow, at a minimum, the guidelines established by the United States
 98 Department of Justice Court Appointed Special Advocate Association.

99 [~~(d)~~] (c) The court may use volunteers trained in accordance with the requirements of
 100 Subsection (4)[~~(c)~~] (b) to assist in investigation and preparation of information regarding the
 101 cases of individual [~~minors~~] children within the jurisdiction.

102 [~~(e)~~] (d) When possible and appropriate, the court may use a volunteer who is a peer of
 103 the [~~minor~~] child appearing before the court, in order to provide assistance to that [~~minor~~]
 104 child, under the supervision of an attorney guardian ad litem or the attorney's trained volunteer,
 105 paralegal, or other trained staff.

106 (5) The attorney guardian ad litem shall continue to represent the best interest of the
 107 [~~minor~~] child until released from [~~that duty~~] duties by the court.

108 (6) (a) [~~Consistent with Subsection (6)(b), the~~] The juvenile court is responsible for[
 109 ~~(i)~~] all costs resulting from the appointment of an attorney guardian ad litem[;] and [~~(ii)~~] the
 110 costs of volunteer, paralegal, and other staff appointment and training[. ~~(b) The court~~], and
 111 shall use funds appropriated by the Legislature for the guardian ad litem program to cover [~~the~~]
 112 those costs [~~described in Subsection (6)(a)~~].

113 [~~(c)~~] (b) (i) When the court appoints an attorney guardian ad litem under this section,
 114 the court may assess all or part of the attorney's fees, court costs, and paralegal, staff, and
 115 volunteer expenses against the [~~minor's~~] child's parents, parent, or legal guardian in a
 116 proportion that the court determines to be just and appropriate.

117 (ii) The court may not assess those fees or costs against[~~(A)~~] a legal guardian, when
 118 that guardian is the state[;], or [~~(B) consistent with Subsection (6)(d)~~], against a parent who is
 119 found to be impecunious. [~~(d) For purposes of Subsection (6)(c)(ii)(B), if~~] If a person claims
 120 to be impecunious, the court shall[~~(i)~~] require of that person [~~to submit~~] an affidavit of

121 impecuniosity as provided in Section 78-7-36[;] and [(ii)] follow the procedures and make the
 122 determinations as provided in Section [~~78-7-37~~] 78-7-36.

123 (7) An attorney guardian ad litem appointed under this section, when serving in the
 124 scope of the attorney guardian ad litem's duties as guardian ad litem is considered an employee
 125 of the state for purposes of indemnification under Title 63, Chapter 30d, Utah Governmental
 126 Immunity Act [~~of Utah~~].

127 (8) (a) An attorney guardian ad litem shall represent the best interest of a [~~minor~~] child.
 128 [~~(b)~~] If the [~~minor's~~] child's wishes differ from the attorney's determination of the [~~minor's~~]
 129 child's best interest, the attorney guardian ad litem shall communicate the [~~minor's~~] child's
 130 wishes to the court in addition to presenting the attorney's determination of the [~~minor's~~] child's
 131 best interest. [~~(c)~~] A difference between the [~~minor's~~] child's wishes and the attorney's
 132 determination of best interest may not be considered a conflict of interest for the attorney.

133 [~~(d)~~] (b) The court may appoint one attorney guardian ad litem to represent the best
 134 interests of more than one [~~minor~~] child of a marriage.

135 (9) An attorney guardian ad litem shall be provided access to all Division of Child and
 136 Family Services records regarding the [~~minor~~] child at issue and the [~~minor's~~] child's family.

137 (10) An attorney guardian ad litem shall maintain current and accurate records
 138 regarding:

- 139 (a) the number of times the attorney has had contact with each [~~minor~~] child; and
- 140 (b) the actions the attorney has taken in representation of the [~~minor's~~] child's best
 141 interest.

142 (11) (a) Except as provided in Subsection (11)(b), all records of an attorney guardian
 143 ad litem are confidential and may not be released or made public upon subpoena, search
 144 warrant, discovery proceedings, or otherwise. This subsection supersedes Title 63, Chapter 2,
 145 Government Records Access and Management Act.

146 (b) [~~Consistent with Subsection (11)(d), all~~] All records of an attorney guardian ad
 147 litem:

- 148 (i) are subject to legislative subpoena, under Title 36, Chapter 14, Legislative
 149 Subpoena Powers; and
- 150 (ii) shall be released to the Legislature.

151 (c) [~~(i) Except as provided in Subsection (11)(c)(ii), records~~] Records released in

152 accordance with Subsection (11)(b) shall be maintained as confidential by the Legislature. ~~[(ii)~~
 153 ~~Notwithstanding Subsection (11)(c)(i), the]~~ The Office of the Legislative Auditor General may,
 154 however, include summary data and nonidentifying information in its audits and reports to the
 155 Legislature.

156 (d) ~~[(i) Subsection (11)(b)]~~ Because of the unique role of an attorney guardian ad litem
 157 described in Subsection (8)(a), and the state's role and responsibility to provide a guardian ad
 158 litem program and, as parens patriae, to protect children, Subsection (8)(a) constitutes an
 159 exception to Rules of Professional Conduct, Rule 1.6, as provided by Rule 1.6(b)(4)[, because
 160 of: (A) the unique role of an attorney guardian ad litem described in Subsection (8); and (B)
 161 the state's role and responsibility: (I) to provide a guardian ad litem program; and (II) as
 162 parens patriae, to protect minors]. [(ii)] A claim of attorney-client privilege does not bar access
 163 to the records of an attorney guardian ad litem by the Legislature, through legislative subpoena.

164 (e) The Office of the Guardian Ad Litem shall present an annual report to the Child
 165 Welfare Legislative Oversight Panel detailing:

- 166 (i) the development, policy, and management of the statewide guardian ad litem
- 167 program;
- 168 (ii) the training and evaluation of attorney guardians ad litem and volunteers; and
- 169 (iii) the number of children served by the Office of the Guardian Ad Litem.

170 Section 2. Section **78-7-9** is amended to read:

171 **78-7-9. Appointment of attorney guardian ad litem in child abuse and neglect**
 172 **proceedings.**

173 (1) If child abuse, child sexual abuse, or neglect is alleged in any ~~[proceeding in any]~~
 174 state court proceeding, the court may upon its own motion or shall upon the motion of any
 175 party to the proceeding appoint an attorney guardian ad litem from the Office of the Guardian
 176 Ad Litem to represent the best interest of the child~~[, in accordance with Sections 78-3a-911 and~~
 177 ~~78-3a-912].~~

178 (2) The court may appoint an attorney guardian ad litem~~;~~ from the Office of the
 179 Guardian Ad Litem when it considers it necessary and appropriate, to represent the best interest
 180 of the child in all related proceedings conducted in any state court involving the alleged abuse,
 181 child sexual abuse, or neglect.

182 (3) The attorney guardian ad litem ~~[shall be appointed in accordance with and meet the~~

183 requirements of Sections 78-3a-911 and 78-3a-912.] appointed under the provisions of this
184 section shall:

185 (a) represent the best interests of the child from the date of the appointment until
186 released by the court;

187 (b) be trained in applicable statutory, regulatory, case law, and the curriculum
188 established by the Office of the Guardian Ad Litem for representation of children;

189 (c) review relevant records pertaining to the child and the child's family, including
190 medical, psychological, and school records in order to obtain a clear understanding of the
191 situation and needs of the child;

192 (d) personally meet with the child;

193 (e) personally or through trained staff, interview the child if the child is old enough to
194 communicate;

195 (f) determine the child's goals and concerns regarding custody or visitation where the
196 child is capable of expressing goals or desires, and when the guardian ad litem determines it
197 will not be harmful to the child to ask questions concerning the child's desires regarding
198 placement;

199 (g) counsel the child regarding the nature, purpose, status, and implications of the case,
200 hearings, recommendations, and proposals by parties and of court orders;

201 (h) conduct discovery, file pleadings and other papers, prepare and review orders, and
202 otherwise comply with the Utah Rules of Civil Procedure as necessary to protect the best
203 interest of the child;

204 (i) unless excused by the court, prepare for and attend all mediation hearings and all
205 court conferences and hearings, and present witnesses and exhibits as necessary to protect the
206 best interests of the child;

207 (j) identify community resources to protect the best interests of the child and advocate
208 for those resources; and

209 (k) participate in all appeals unless excused by the court.

210 (4) If an attorney guardian ad litem has been appointed for the child by any court in the
211 state in any prior proceeding or related matter, the court may continue that appointment or may
212 reappoint that attorney guardian ad litem, if still available, to act on behalf of the child.

213 (5) If after investigation, the Office of the Guardian Ad Litem determines that the

214 allegations of abuse or neglect does not warrant the involvement of the Office of the Guardian
215 Ad Litem, the guardian ad litem may seek withdrawal from the court and request that the court
216 appoint a private guardian ad litem pursuant to Section 78-7-45.

217 [(5)] (6) The court is responsible for all costs resulting from the appointment of an
218 attorney guardian ad litem and shall use funds appropriated by the Legislature for the guardian
219 ad litem program to cover those costs.

220 [(6)] (a) If the court appoints the Office of the Guardian Ad Litem in a civil case
221 pursuant to this section, the court may assess all or part of those attorney's fees, court costs,
222 paralegal, staff, and volunteer expenses against the [minor's] child's parent, parents, or legal
223 guardian in an amount that the court determines to be just and appropriate.

224 (b) The court may not assess those fees or costs against a legal guardian, when that
225 guardian is the state, or against a parent, parents, or legal guardian who is found to be
226 impecunious. If a person claims to be impecunious, the court shall require of that person an
227 affidavit of impecuniosity as provided in Section 78-7-36 and the court shall follow the
228 procedures and make the determinations as provided in Section 78-7-36.

229 (c) If the court appoints the Office of the Guardian Ad Litem in a criminal case
230 pursuant to this section and if the defendant is convicted of a crime which includes child abuse
231 or neglect, the court shall include as part of the defendant's sentence all or part of the attorney's
232 fees, court costs, and paralegal, staff, and volunteer expenses of the Office of the Guardian Ad
233 Litem.

234 (7) An attorney guardian ad litem appointed in accordance with the requirements of
235 this section [~~and Sections 78-3a-911 and 78-3a-912 is~~], when serving in the scope of duties of
236 an attorney guardian ad litem, considered an employee of this state for purposes of
237 indemnification under [~~the~~] Title 63, Chapter 30d, Utah Governmental Immunity Act.

238 (8) (a) An attorney guardian ad litem shall represent the best interest of a child. If the
239 child's wishes differ from the attorney's determination of the child's best interest, the attorney
240 guardian ad litem shall communicate the child's wishes to the court in addition to presenting
241 the attorney's determination of the child's best interest. A difference between the child's wishes
242 and the attorney's determination of best interest may not be considered a conflict of interest for
243 the attorney.

244 (b) The court may appoint one attorney guardian ad litem to represent the best interests

245 of more than one child of a marriage.

246 (9) An attorney guardian ad litem shall be provided access to all Division of Child and
247 Family Services records regarding the child at issue and the child's family.

248 (10) An attorney guardian ad litem shall maintain current and accurate records
249 regarding the number of times the attorney has had contact with each child and the actions the
250 attorney has taken in representation of the child's best interest.

251 (11) (a) Except as provided in Subsection (11)(b), all records of an attorney guardian
252 ad litem are confidential and may not be released or made public upon subpoena, search
253 warrant, discovery proceedings, or otherwise. This Subsection (11) supersedes Title 63,
254 Chapter 2, Government Records Access and Management Act.

255 (b) All records of an attorney guardian ad litem are subject to legislative subpoena,
256 under Title 36, Chapter 14, Legislative Subpoena Powers, and shall be released to the
257 Legislature.

258 (c) Records released in accordance with Subsection (11)(b) shall be maintained as
259 confidential by the Legislature. The Office of the Legislative Auditor General may, however,
260 include summary data and nonidentifying information in its audits and reports to the
261 Legislature.

262 (d) Because of the unique role of an attorney guardian ad litem described in Subsection
263 (8)(a), and the state's role and responsibility to provide a guardian ad litem program and, as
264 parens patriae, to protect children, Subsection (8)(a) constitutes an exception to Rules of
265 Professional Conduct, Rule 1.6, as provided by Rule 1.6(b)(4). A claim of attorney-client
266 privilege does not bar access to the records of an attorney guardian ad litem by the Legislature,
267 through legislative subpoena.

Legislative Review Note

as of 1-31-06 9:53 AM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel